Foley on the Future of *Bush v. Gore*

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I. INTRODUCTION

Ned Foley has performed a great service in thinking through how *Bush v. Gore*[1] might be applied in the future.[2] It is an especially helpful enterprise given that the case and the election it decided are still prominently in the minds of the public as well as the legal community. Foley's task of divining *Bush v. Gore*'s future is both invited and discouraged by the decision itself. The case invites a great expansion of election law litigation by relying on the broad principle of equal protection.[3] If the Florida Supreme Court's ordered recount violated equal protection norms by allowing different recount practices in different counties,[4] should not this principle be extended to the many other aspects of elections? Why should states permit differences across counties in voting machines, polling place location, voting by mail practices, polling hours, etc.? But *Bush v. Gore* couples this invitation to broad application of equal protection to election practices with an explicit discouragement that the case is about a particular set of facts and has little or no precedential value.[5]

Foley's task is to navigate through this *Scylla and Charybdis* and sort out where courts might rely on *Bush v. Gore*, where they might not, and why. He accomplishes this in three ways. First, he provides a thoughtful taxonomy of cases that are working their way through the legal system.[6] Second, he looks at the psychology of the Court's willingness to take on *Bush v. Gore* cases.[7] Third, he thinks through how the individual justices might apply *Bush v. Gore*.[8]

Through all of this, Foley educates his reader, raises many important issues, and unveils nuances in the Court's psychology, but he only hints at something that I will say more directly: *Bush v. Gore* is not likely to be a precedent for much at all.

The reasons for the bleak future of *Bush v. Gore* are in the text of the decision itself, several factors lying behind the scenes in *Bush v. Gore*, and

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[1] Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

[2] Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 OHIO ST. L.J. 925 (2007).

[3] *See Bush*, 531 U.S. at 104.

[4] *Id.* at 105–06.

[5] *Id.* at 109.

[6] Foley, *supra* note 2, at 930–46.

[7] *Id.* at 946–64.

[8] *Id.* at 964–76.

the impracticality of expanding a decision to the field of election law, which is almost by definition characterized by diverse election practices among—and even within—the states.

II. *BUSH V. GORE*'S EXPLICIT LIMITATION OF ITS APPLICABILITY

Foley rightly notes that the Court has been unfairly ridiculed for attempting to limit the application of equal protection to other election law cases.[9] It is, however, worth laying out exactly what the Court says in applying equal protection in *Bush v. Gore*.[10]

The key articulation of the circumstances that have triggered the equal protection claim is that "[t]he recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer."[11]

Taken literally, the Court means to limit the equal protection claim to the "special instance" when there is a statewide recount ordered by a court and where it can be shown that there are diverse recounting procedures in various jurisdictions.[12]

This limited set of circumstances is confirmed in other parts of the opinion where the Court raises the question "whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate."[13]

Likewise, the Court answers its own question: "The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right" to vote.[14] And again:

> [W]e are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.[15]

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[9] *Id.* at 932.

[10] Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

[11] *Id.* at 109.

[12] *Id.*

[13] *Id.* at 105.

[14] *Id.*

[15] *Id.* at 109.

The Court stressed several times that the Florida Supreme Court had the power to order a statewide remedy regarding the recount.[16] But with that power comes a responsibility of equal treatment statewide. The Court even implied that the Florida Supreme Court could have gotten it right with "substantial additional work," although it found that there was no time to do that additional work.[17]

In addition to the limitation of the circumstances that *Bush v. Gore* would apply to statewide judicial recounts, the Court distinguished these circumstances from the broader question of "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."[18] The Court was clear that this larger question about variability of election practice among local entities is not before the Court, so it did not render judgment on the matter.[19] However, the Court did note a positive reason for such variability: that it might be warranted because of special "expertise" local entities would have in conducting elections in their area.[20] The Court's distinctions, the positive description of local expertise, and the ubiquity of differences in election administration among local entities are a great contrast to the special circumstances under which the Court extended equal protection in judicially sanctioned statewide recounts.

III. LURKING BEHIND EQUAL PROTECTION: POST-ELECTION PROBLEMS

Further bolstering the text of the opinion's limitation of the scope of *Bush v. Gore*'s application in other cases are two concerns with the special problem of election procedures in the aftermath of elections. Simply put, the Court attempted to limit the applicability of *Bush v. Gore* to post-election equal protection issues,[21] and this limitation is not as arbitrary as it may at first seem. First, while the per curiam opinion did not adopt the argument that the Florida Supreme Court had effectively and illegitimately changed the pre-existing election scheme,[22] that argument lurks in the background of the equal protection claim, making it much stronger in cases of post-election issues. Second, there is an additional argument that the Court did not make, but that is consistent with the limitation of its equal protection logic to post-

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[16] *Bush*, 531 U.S. at 105, 110.

[17] *See id.* at 109–10.

[18] *Id.* at 109.

[19] *Id.*

[20] *Id.*

[21] *See id.* at 110.

[22] Bush, 531 U.S. at 113–14 (Rehnquist, C.J., concurring).

election matters: changes in election procedure that occur during the counting of the vote are more susceptible to partisan pressures than those made before the election.

IV. HOW REHNQUIST'S CONCURRENCE HAD AN EFFECT ON THE COURT'S DECISION ON *BUSH V. GORE*

In *Bush v. Gore*, the Court was presented with another argument as to why it should overturn the Florida Supreme Court's statewide recount. The plaintiffs presented—and Chief Justice Rehnquist and Justices Scalia and Thomas accepted—the argument that the Florida Supreme Court's actions would have constituted a change in the election scheme that the legislature had enacted before the election and thus might, against the wish of the legislature, endanger Florida's ability to have its presidential electors counted in the Electoral College.[23]

While the per curiam opinion relied on equal protection grounds, the argument in the Rehnquist concurrence about changing the legislative scheme and the problem of adopting new procedures post-election does have some resonance in the opinion.[24] This lends further support to the notion that the Court saw the equal protection grounds as especially compelling and applicable in the post-election context.

The gist of the argument is that the Constitution gives the state legislature the power to determine the method of selecting presidential electors. The Constitution provides "[e]ach State shall appoint [electors], in such manner as the Legislature thereof may direct . . . ."[25] The primacy of the state legislature in selecting the electors is evident in several other ways. State legislatures commonly selected electors directly without a popular election in the early presidential elections after the adoption of the Constitution.[26] South Carolina continued the practice until the Civil War, and there were even later examples of legislatures selecting electors in the extraordinary case when a state joined the Union shortly before a presidential election.[27]

But if the legislature does not directly appoint electors, it is primarily responsible for establishing the electoral scheme in law.[28] The Electoral

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[23] *Id.*

[24] *See id.* at 108–09.

[25] U.S. CONST. art. II, § 1, cl. 2.

[26] McPherson v. Blacker, 146 U.S. 1, 28–33 (1892).

[27] JOHN C. FORTIER, AFTER THE PEOPLE VOTE 4 (John C. Fortier ed., AEI Press 3d ed. 2004) (1983).

[28] *McPherson*, 146 U.S. at 27.

Count Act, which lays out procedures for the counting of electors, gives primacy to electors selected under election laws passed prior to the election, but disfavors electors selected by some law or contest provision that is established after the election:

> If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures . . . such determination shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.[29]

The Electoral Count Act established a framework for states to get their official slate of electors in to federal authorities so that their votes would be counted by Congress.[30] It established the "safe harbor" provision—relied on in the *Bush v. Gore* per curiam opinion—favoring the counting of the votes of electors whose names are finalized by six days before the meeting of the electors and are appointed under pre-existing law.[31] Indeed, the Electoral Count Act included such a provision in order to avoid the difficulties that arose in the 1876 election when state recounts were again at issue.[32] The problems in 1876 were in several states, and in some cases involved competing governments or competing branches of governments submitting different slates of electors.[33] Clearly, the point of requiring states to adopt an electoral scheme in advance was to avoid post-election shenanigans.

Slates of electors picked in advance of a specified date and under pre-existing law should be counted. The plaintiffs argued that the Florida Supreme Court had disregarded the pre-established law and effectively established a new one in its rulings on altering the contest period and ordering a statewide recount.[34] By effectively changing the law after the election, the Florida Supreme Court endangered the counting of the Florida electors.

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[29] 3 U.S.C. § 5 (2000).

[30] *Id.*

[31] *Id.*

[32] *See* Eric Schickler et al., *Safe at Any Speed: Legislative Intent, the Electoral Count Act of 1887, and* Bush v. Gore, 16 J.L. & POL'Y 717, 733–35 (2000); John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633, 638–39 (1888).

[33] Norman J. Ornstein, *Three Disputed Elections: 1800, 1824, and 1876*, *in* AFTER THE PEOPLE VOTE (John C. Fortier ed., AEI Press 3d ed. 2004) (1983).

[34] *See* Bush v. Gore, 531 U.S. 98, 103 (2000) (per curiam).

The per curiam opinion does not adopt this line of thinking, but it does on several occasions take up the Rehnquist opinion's worry about the Florida Supreme Court changing pre-existing election law. First, the per curiam opinion accepts that the Florida legislature intended to meet the December 12 "safe harbor" deadline for the appointment of electors, and it relies on that fact to end the possibility of a properly structured recount going forward because the time was too short.[35] If change from pre-existing law were not a problem for the Supreme Court, it might have allowed the Florida Supreme Court to proceed on a different timeframe, and the Florida Supreme Court might have found that missing the "safe harbor" deadline was a necessary evil in order to conduct a fair recount. But the opinion stuck to the legislature's earlier judgment on the matter.[36]

Second, the per curiam opinion discusses the case of Palm Beach County switching its standard several times during the recount process on what should be considered a legal vote.[37] While the example is supposed to support the equal protection claim that standards might vary "not only from county to county but indeed within a single county from one recount team to another," the thrust of the example is to show the destabilizing effect of the change from pre-existing law.[38]

The Court did not decide *Bush v. Gore* on the grounds laid out in the Rehnquist concurrence, but the concern with post-election changes to election procedures is prominent in the equal protection argument of the Court, adding support to the Court's attempt to limit *Bush v. Gore*'s applicability to the post-election context.

V. POLITICAL MANEUVERING AND POST-ELECTION CHANGES TO PROCEDURES

One additional reason the Court might have relied upon to limit its equal protection reasoning to post-election recounts is the grave problem associated with self-interest of vote counters in a standardless post-election environment. As a general matter, the post-election period is more susceptible to self-interested parties changing standards to benefit their favored candidates. In most cases, a decision by vote counters in a manual recount is determinative of the vote. If, in examining a ballot, vote counters decide that it reflects a voter's intent to vote for Al Gore, then the vote will be tallied for Al Gore. In the case of a manual recount, the judgment of those making the determination as to the status of the vote might be colored by the

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[35] *Id.* at 111.

[36] *Id.*

[37] *Id.* at 106–07.

[38] *Id.* at 106.

political preferences of the counter. This might be true on a ballot-by-ballot basis or on the more general decision of what standard to use in counting ballots.

Pre-election procedures might also be subject to manipulation by self-interested parties. A lack of standards or overly broad discretion might lead to such manipulation. But in the case of pre-election issues, the connection to an increased number of votes is more speculative than in the post-election recount scenario. Take, for example, a county that had discretion as to how to apply a photo ID law to its residents. If the dominant political party believed that strict enforcement would benefit their candidates, then they might adopt such a strict standard. But the connection of this standard to the number of votes cast is much more uncertain in the pre-election period. The people discouraged from voting by the ID rule might likely come from both parties, albeit in different numbers.

In the post-election recount scenario, the number of votes separating the candidates will likely be known, and this may increase the pressure to bend standards or adopt new ones in order to "find" a few more votes. In the pre-election period, there may be estimates about the closeness of the race, but the exact margin between two candidates cannot be known with any degree of certainty. Thus, interested parties do not know how many votes will be needed to put their favored candidate over the top.

While unequal application of standards prior to the election can have bad effects, they are magnified in the post-election contest. Clearly, the public and the Bush and Gore supporters worried very much about this aspect of recounts, and the partisans of both sides made the argument that the other side was bending the rules to squeeze out a few more votes. The Court does not cite this reason for the importance of equal standards in a recount situation, but it is nonetheless an important distinguishing characteristic between pre- and post-election procedures that fits well with the Court's limitation of its equal protection logic.

VI. WHY A GENERAL PRINCIPLE OF EQUAL PROTECTION WOULD BE UNWORKABLE AND INCONSISTENT WITH ELECTION ADMINISTRATION IN AMERICA

One last major argument against a broad application of *Bush v. Gore*'s equal protection language is that election administration in the United States is extremely diverse and decentralized. States have very different modes of holding elections, and states frequently allow their local jurisdictions to have great leeway in the policy, planning, and administration of elections.

A broad application of equal protection would be difficult to administer and would ultimately push toward uniformity of election practices within states and likely across states. While advocates of such uniformity might

applaud this move, it cannot be over-emphasized how large the change would be and how states and localities with particularized and popular practices would resist such change.

Take the logic of the equal protection argument to its extreme and nearly every difference among jurisdictions in their administration of elections would fall by the wayside. Take, for example, such mundane practices as polling place hours. The New Hampshire primary begins with the tiny town of Dixville Notch, voting after the clock strikes midnight on election day, while residents of other towns cannot vote for several hours.[39] This unequal treatment of voters seems insignificant, but might make it easier for some residents to get to the polls than others.

The State of Washington is just one example of a state whose counties have varying practices on voting by mail.[40] A number of counties have moved to a system of essentially all-mail voting, in which residents are mailed their ballots and do not go to polling places on election day. Other counties in the state have a mixture of election day polling places and mail ballots. Texas has widespread early voting at polling places, but the accessibility to and participation in early voting vary widely from county to county.[41]

Many states have different voting machines in different counties. Local jurisdictions themselves have different voting machines at different precincts. Local jurisdictions may have different voting machines for different purposes, such as precincts that have a voting machine of one type that is most accessible to disabled voters and other machines that are used for voters without disabilities. Counties sometimes employ different counting machines at the precinct and countywide level so that ballots cast in the same way are counted on different types of machines depending on whether they were cast at local precincts or mailed or dropped off at the county seat.[42]

Several counties in the State of Colorado have introduced vote centers, which do away with small precincts in favor of a system in which any voter can cast his or her particular ballot at a number of supersized and conveniently located voting centers.[43]

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[39] HUGH GREGG & BILL GARDNER, WHY NEW HAMPSHIRE? 42–43 (2003).

[40] *See generally* County Auditors/Election Dept. in WA State, http://www.secstate.wa.gov/elections/auditors.aspx (last visited Oct. 15, 2007); ELECTIONLINE.ORG, ELECTION PREVIEW 2006: WHAT'S CHANGED, WHAT HASN'T AND WHY (2006), http://www.electionline.org/Portals/1/Publications/Annual.Report.Preview.2006.Final.pdf.

[41] Robert Stein, *Early Voting*, 62 PUB. OPINION Q. 57, 69 (1998).

[42] ELECTIONLINE.ORG, *supra* note 40.

[43] LARIMER COUNTY, COLO., CLERK AND RECORDER, http://www.co.larimer.co.us/elections/votecenters_tab.htm (last visited Oct. 15, 2007).

The State of California requires that if there are fewer than 250 people who would need the same ballot style (i.e. the same list of offices and referenda), then those people will be required to vote by absentee ballot, and there will be no polling place opened for them.[44]

Across the states the differences are even greater. Some states have same-day registration, while others, including Minnesota, are contemplating actively registering voters rather than requiring voters to register themselves.[45] Meanwhile, some states, like North Dakota, have no registration at all.[46]

States have widely differing practices on overseas ballots, including when they mail them out.[47] Some states allow voting by fax.[48] The Federal Voter Assistance Progam has experimented with military overseas voting by internet.[49] This Article will not discuss the more controversial differences such as different treatment of felon voting rights, provisional ballot eligibility, and voter identification laws.[50]

There are hundreds of practices that vary across and within states. Some are historical accidents, others newly introduced popular reforms. Some are likely engineered by a political party that believes the practice favors its candidates. Other practices may be targeted to address the special needs of a population such as the blind or Native Americans on reservations.

A broad application of equal protection is unworkable. It would require massive change and it would make it difficult for the courts to make practices equal on a case-by-case basis. Further, it would likely meet significant resistance. How, for example, would one assess a voter identification law's impact if one county had a strict voter identification law, but a very liberal absentee ballot law that allowed most voters to avoid showing up at the polling place to show an ID, as opposed to another county that had no ID requirement, but strictly limited voting by mail? Would the Court compare apples to oranges and try to equalize as best it could the entire web of election procedures, or would it drive towards equality in everything?

If federal courts truly wanted to enforce uniformity only within states, they would face the problem that the courts would have to become intimately

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[44] CAL. ELEC. CODE § 3005 (West 2007).

[45] S.F. 1297, 85th Sess., 1st Engross. (Minn. 2007).

[46] NCSL VOTER REGISTRATION DEADLINES, http://www.ncsl.org/programs/legismgt/elect/taskfc/deadlines.htm (last visited Oct. 16, 2007).

[47] *See generally* GREGG & GARDNER, *supra* note 39, at 39–45.

[48] FVAP Voting Assistance Guide, http://www.fvap.gov/services/faxing.html (last visited Oct. 15, 2007); S.C. CODE § 7-15-460 (2006).

[49] FVAP VOTING OVER THE INTERNET ASSESSMENT REPORT, http://www.fvap.gov/services/voireport.pdf (last visited Oct. 15, 2007).

[50] *See* Foley, *supra* note 2, at 930–46.

familiar with the election administration practices of all fifty states and carefully watch over state courts and institutions. That administrative difficulty might lead courts to minimize the differences between states and push for national uniformity. The Court's limitation of the principle in *Bush v. Gore* looks more sensible in light of the unworkability of an unlimited application of equal protection principles to election administration.

VII. FOLEY'S TAXONOMY

Foley provides a helpful taxonomy of election administration cases brought before courts that may fall under the equal protection precedent of *Bush v. Gore*.[51] He usefully distinguishes the types of cases as those that treat ballots differently because of: (1) insufficiently specified standards, (2) the failure to follow prescribed standards, (3) state-authorized local discretion, and (4) variations within local jurisdictions. Foley is generally skeptical of the prospects for these cases, and rightly so.

He does note that the first category of unspecified standards has the most in common with *Bush v. Gore*, for much of the confusion in Florida resulted from the broad standard of voter intent being the guide for county recounts[52] without further central guidance as to how to determine how that intent was to be determined. Foley might have added that *Bush v. Gore* also criticized some aspects of state-authorized local discretion.[53] While the State of Florida may have been guilty of allowing the counties too much discretion, the Florida Supreme Court in its recount order approved differences in county practices.[54] The U.S. Supreme Court in *Bush v. Gore* was critical of the Florida Supreme Court, for example, for allowing counties to have different standards on "overvotes" and for allowing counties to submit results with partial recounts.[55]

The trouble with all of the principles articulated in the taxonomy is that they are quite broad. If equal protection were extended to all circumstances where there are inadequate standards, then this argument could be applied to buying voting machines, implementing voter identification policies, mailing out absentee ballots, or nearly any other election practice. Each of the four principles in the taxonomy explains a way in which a county may end up with a different treatment of ballots from another county. But the unequal treatment of ballots due to "insufficiently specific state rules" is a subset of

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[51] *Id.* at 932–45.

[52] *Id.* at 933–34.

[53] *See* Bush v. Gore, 531 U.S. 98, 107 (2000) (per curiam).

[54] Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1228–29 (Fla. 2000) (per curiam).

[55] *See Bush*, 531 U.S. at 108–10.

equal protection claims in a sense,[56] yet still a principle that could conceivably be invoked against many election practices. The Court's limitation of the equal protection principle in *Bush v. Gore* to post-election statewide recounts is much narrower than any of these four broad areas.

The one subject discussed in Foley's taxonomy that might have some resonance with the Court is the issue of provisional voting. The larger issue of whether states should count out-of-precinct provisional ballots will likely be a significant policy issue in state legislatures. The issue that has generated the most controversy is the question of whether provisional votes cast by eligible voters who vote in the wrong precinct should be counted. It is not clear that this controversy is particularly likely to be resolved by the courts, as the Help America Vote Act essentially authorized states to use either a strict or loose policy on the counting of provisional votes out of precinct.

But on other matters regarding provisional ballots, the Court might find itself faced with the same post-election discretion issues that it did in *Bush v. Gore*. Provisional ballots could be crucial to an election outcome, and they will be litigated after the initial election results are known. Wide variations within a state on policy regarding the counting of provisional ballots, especially those based on on-the-ground discretion of local officials, would have the feel of a recount.

Foley discusses the controversial Washington State gubernatorial election with respect to the problem of provisional ballots.[57] He imagines a scenario where the post-election squabbling over rejected absentee and provisional ballots leads to a statewide court-ordered recount. There he sees identical circumstances as in *Bush v. Gore*, and he raises the question of whether we would need almost exactly the same fact pattern as *Bush v. Gore* for the Court to again intercede on the same grounds.[58]

Even with the limited understanding of the *Bush v. Gore* precedent put forward in this piece, one can still imagine the Court applying its precedent in a slightly broader set of circumstances. Take Foley's example of Washington State, with counties using different standards on the rejection of provisional and absentee ballots amid the post-election jockeying of both political parties in a razor-close election. One could imagine that the Court might intervene as it did in *Bush v. Gore* if another entity other than a court ordered a statewide recount ratifying these different procedures, or if a government entity with the power to step in did not step in even in the face of egregious bending of the rules by the counties. In these instances, the post-election jockeying combined with loose standards and a close margin have

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[56] Foley, *supra* note 2, at 932–45.

[57] *Id.* at 934.

[58] *Id.* at 955–56.

enough of the feel of the atmosphere in Florida in the aftermath of the 2000 election to make the Court consider intervening.

VIII. FOLEY ON WHETHER THE COURT WILL TAKE UP *BUSH V. GORE*

In discussing how a case relying on *Bush v. Gore* might make it to the Supreme Court, Foley is again skeptical that the Court will employ *Bush v. Gore* as a precedent in the near future[59] and has some doubts about the longer-term future as well.[60]

Perhaps the most promising avenue that Foley identifies for *Bush v. Gore* being addressed by the Court is his scenario of a circuit court or more than one circuit court using *Bush v. Gore* as a precedent to strike down a popular state election practice.[61] Either because the Supreme Court felt that the circuit court had gone too far or because of a conflict between circuits, the Court might be compelled to step in and stress the limited character of the precedent. But even such a narrowing might have the unexpected result of fleshing out more of the details of the limits of *Bush v. Gore* and might encourage litigation within those limits.

Given the Court's limitation of the equal protection principle in *Bush v. Gore*, Foley rightly argues that the Court is unlikely to look for opportunities to expand the equal protection principle to other areas of election law.[62] Foley also thoughtfully considers how the Court might avoid taking on such cases even in the case of circuit conflicts or overreaches.[63] Nonetheless, a circuit court applying *Bush v. Gore* in a broad manner to strike down a popular or longstanding election practice in a state might pique the Court's interest. And even though the intention of the Court might be to limit the reach of *Bush v. Gore*, by ruling on its limits, the Court might clarify certain areas where the precedent would have life.

IX. FOLEY ON INDIVIDUAL JUSTICES

Foley's discussion of the *Bush v. Gore* dilemmas is nuanced and balanced. Justices who did not join the decision might be more inclined to support the general principle of equal protection, but perhaps less likely to support the decision of *Bush v. Gore* itself as a precedent. Similarly, Justices who might be the most likely to limit the reach of equal protection might

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[59] *Id.* at 976–80.

[60] *Id.* at 980–85.

[61] *Id.* at 973–74.

[62] Foley, *supra* note 2, at 991–92.

[63] *Id.* at 977–83.

come to the defense of *Bush v. Gore*, although the Justices' defenses might emphasize its narrow character.

The two most interesting speculations about the future decisions of the Justices are Foley's thoughts on where the new Justices will end up and how the likely author of *Bush v. Gore*, Justice Kennedy, will view his handiwork in the future.[64] On the former point, Chief Justice Roberts's emphasis on incremental change and his willingness to decide matters on a case-by-case basis would point to him retaining a narrow view of the applicability of *Bush v. Gore*. Foley at times suggests that Roberts's espoused judicial restraint would lead to a very cautious application of *Bush v. Gore* to new circumstances.[65] But Foley also argues that Roberts's judicial modesty and his explicit statements during the confirmation process might persuade him to work hard to keep the precedent of *Bush v. Gore* alive. Given the thicket that the Court would likely enter if it broadly applied *Bush v. Gore*, Roberts seems more inclined to embrace Foley's former description than his latter.

The case of Kennedy is more complicated, as Foley notes. Foley lays out a range of possibilities, including the option that Kennedy will feel some pride of authorship and will not want to see a case of such prominence not employed as precedent.[66] This, however, assumes that Justice Kennedy wants to see an expansion of the principle of equal protection and that he is unhappy with its limitations. From the text of the opinions and the Pandora's Box this pride of authorship would open, it is more likely that Justice Kennedy is pleased to have a narrow precedent for *Bush v. Gore* even if that means that the case will rarely come into play.

X. CONCLUSION

Ned Foley's "The Future of *Bush v. Gore*?" is a helpful road map for the course of election litigation, the future of the Court and its Justices' opinions on *Bush v. Gore*, and generally a sober assessment of the case's prospects.

The Court is unlikely to go back on its own explicit limitation of the reach of *Bush v. Gore*. That is not to say that before *Bush v. Gore* rears its head again as a precedent it will once more require the perfect storm of a disputed presidential election, hanging on one close state, where election jockeying and differences among counties is pre-empted by a court-ordered state recount that blesses these differences. But the Court might employ *Bush v. Gore* as a precedent in a closely contested post-election scenario, in decisions reining in circuit courts who exuberantly apply *Bush v. Gore* to

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[64] *Id.* at 973–73.

[65] *Id.* at 971–72.

[66] *Id.* at 972–73.

strike down state election practices, and in modest ways that would fit with the moderation of Chief Justice Roberts and Justice Kennedy.

With a case of such prominence and with such an important outcome, it is tempting to assume that it will have wide applicability. But Foley's outline of the possible outcomes shows a more modest future. *Bush v. Gore* will be a case for the history books, but it will not likely be the case that paves the way for wide-scale reform or centralization of election reform practices.